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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Petitioner,

v.

EVA REISNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 2

STATEMENT OF THE CASE 3

ARGUMENT 4

I. The Court Below Erred In Interpreting The Legislative History Of 18 U.S.C. 1161 5

II. The Ninth Circuit's Opinion Is Internally Inconsistent 8

III. If Followed, The Ninth Circuit Opinion Would Lead To The Kind Of Discrimination Which Congress Sought To Outlaw By Enacting 18 U.S.C. 1161 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Muckleshoot Indian Tribe v. State of Washington, et al., 678 F.2d 1340 (1982) 3

Rehner v. Rice, 678 F.2d 1340 (1982) 5, 8

The Tulalip Tribes of Washington v. State of Washington, et al., 678 F.2d 1340 (1982) 3

Statutes:

18 U.S.C. 1154 4

18 U.S.C. 1156 4

18 U.S.C. 1161 . . . . . 3, 4, 6, 7, 8, 9

18 U.S.C. 3113 4

18 U.S.C. 3488 4

18 U.S.C. 3618 4

Other: *Page*

A Bill To Terminate Federal Discrimination Against The Indians Of Arizona, H.R. 1055, 83rd Cong., 1st Sess. (1953) 5

H.R. Rep. No. 775, 83rd Cong., 1st Sess. (1953) 5

Public Law 83-277 . . . . . 4, 5

S. Rep. No. 722, 83rd Cong., 1st Sess. (1953) 6, 9

99 Cong. Rec. 10800 (1953) 5

99 Cong. Rec. 10928 (1953) 5

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This brief is submitted with the written consent of all parties.

The National Alcoholic Beverage Control Association (NABCA), by its attorney, files this brief as *amicus curiae* supporting the position of Petitioner and respectfully urges this Court to declare that 18 U.S.C. 1161 does not exclude states from exercising their Twenty-First

Amendment powers to regulate the distribution and sale of alcoholic beverages within Indian territory located within their boundaries.

INTEREST OF *AMICUS CURIAE*

The National Alcoholic Beverage Control Association is a Wyoming corporation which represents the 18 states and Montgomery County, MD, which currently exercise Twenty-First Amendment powers to control the distribution and sale of alcoholic beverages, including distilled spirits and, in many cases, wine and malt beverages, within their borders. These jurisdictions – Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming – are commonly referred to as "control" or "monopoly" states.

These jurisdictions possess the licensing authority utilized by the 32 so-called "open states," in that they provide for the operation and regulation of restaurants, taverns and other places where alcoholic beverages are served for on-premises consumption. Many of the NABCA member jurisdictions, like their "open" state counterparts, also license retail stores and other package stores and other locations where alcoholic beverages are sold for off-premises consumption.

What makes the NABCA member jurisdictions different from the 32 "open" states, however, is that the legislatures of these 18 states (and Montgomery County, MD, which was delegated control authority by the Maryland State Legislature) have decided that it is in the best interests of the citizens of their respective states to have the distribution and sale of alcoholic beverages more

tightly controlled than is possible through the licensing process used by "open" states.

Most of the NABCA member jurisdictions have Indian territory within their borders and thus their interest is great in the subject matter of the instant case. Indeed, one control state, Washington, was involved in litigation which was heard and decided by the United States Court of Appeals for the Ninth Circuit at the same time as the instant case. *Muckleshoot Indian Tribe v. State of Washington, et al., The Tulalip Tribes of Washington v. State of Washington, et al.*, 678 F.2d 1340 (1982).

The interest of NABCA is predicated upon the substantial and far-reaching consequences of any result in the instant case. The concern of the *amicus curiae* is that the Court, in formulating the principles to govern the particular dispute involved in the present case, should have the benefit of NABCA's views, which may not otherwise be presented in the arguments of the parties, in order to be aware of the ramifications of its decision herein on control state operations.

STATEMENT OF THE CASE

Petitioner, in its brief to this Court, has outlined the general principles appliable to the instant case. The United States Circuit Court of Appeals for the Ninth Circuit, in affirming in part and reversing in part decisions of the United States District Court for the Southern District of California and the United States District Court for the Western District of Washington, found that tribes exercise exclusive regulatory jurisdiction under 18 U.S.C. 1161 over liquor sales on the Indian reservations and that the Twenty-First Amendment does not expand states' jurisdictions over liquor sales on Indian reservations.

ARGUMENT

In the early days of this country, the Congress of the United States sought to exercise, with respect to the distribution and sale of alcoholic beverages, a differing set of standards for activity which took place within so-called Indian country than for similar actions which occurred in land outside of Indian country.

This discriminatory trestment extended for more than 150 years and was contained in a series of federal enactments which, among other things, prohibited the possession and sale of alcoholic beverages within Indian country. *See* 18 U.S.C. 1154, 1156, 3113, 3488, 3618. In 1953, however, Congress eliminated the paternalistic approach of the federal government and substituted in its place a system of two-part local option—involving the integration of state and tribal laws and ordinances—for the regulation of liquor sales.

The vehicle for this new system was the Act of August 15, 1953 (Public Law 83-277), which added 18 U.S.C. 1161, and which provided that the long-standing federal prohibitions against sale and distribution of alcoholic beverages within Indian country would only be removed under certain circumstances:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country, provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly aopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register.

18 U.S.C. 1161.

In its decision below, the United States Court of Appeals for the Ninth Circuit concluded that "section 1161 grants the states no jurisdiction to license or distribute liquor in Indian country." *Rehner v. Rice*, 678 F.2d 1340, at 1348 (1982).

NABCA believes, however, that the Court's opinion ignored the relevant legislative history of the statute in question, is internally inconsistent and, if followed, would lead, in the control states which NABCA represents, to the very kind of discriminatory treatment which Congress sought to eliminate through enactment of the section.

I.

THE COURT BELOW ERRED IN INTERPRETING THE LEGISLATIVE HISTORY OF 18 U.S.C. 1161

Public Law 83-277 began as legislation to change the previously-cited prohibitions on alcoholic beverage sales only with regard to the Indians of Arizona. See "A Bill To Terminate Federal Discrimination Against The Indians Of Arizona," H.R. 1055, 83rd Cong., 1st Sess. (1953). However, when this bill was reported by the House Committee on Interior and Insular Affairs, its original language had been stricken and new and expanded language, making the end of liquor prohibitions applicable to all Indian country, had been substituted. See H.R. Rep. No. 775, 83rd Cong., 1st Sess. (1953). This reported version of H.R. 1055 was subsequently modified slightly by the Senate Committee on Interior and Insular Affairs, and was passed by the full Senate. 99 Cong. Rec. 10800 *et seq.* (1953). Later, the House agreed to the Senate amendments, 99 Cong. Rec. 10928 (1953), and the bill was signed into law by the President.

On its face, the language of 18 U.S.C. 1161 eliminates the applicability of the federal liquor prohibition only if *two* criteria are met: the act or transaction occurring within Indian country must conform *both* with the laws of the state in which the Indian country is located *and* with a duly-adopted ordinance of the tribe having jurisdiction over the particular area of Indian country where the transaction occurs.

This plain language makes it clear, in NABCA's view, that Congress intended for states and Indian tribes to exercise concurrent jurisdiction over transactions occurring in Indian country. The statute does not confer exclusive jurisdiction on either the state or the Indian tribe, but mandates by its terms that laws of both must be complied with in order for the long-standing federal prohibition against liquor sales to be overridden. If the transaction complies with the ordinance of an Indian tribe, but not with the laws of the state in which the transaction occurs, the requirements of 18 U.S.C. 1161 have not been met, and the federal prohibition against liquor sales is continued.

This construction is supported by the report of the Senate Committee explaining the legislation. Stating that the bill would repeal Federal statutes relating to the introduction and possession of intoxicants in Indian country, the Committee said:

> [I]f this bill is enacted, a State or local municipality or Indian tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales of intoxicants to Indians, they may do so

S. Rep. No. 722, 83rd Cong., 1st Sess., reprinted in (1953) U.S. Code Cong. & Ad. News 2399-2400.

Note that the Senate Committee is declaring that either a state *or* an Indian tribe can restrict sales of intoxicants

to Indians. The Congress did not declare, nor did it limit, the form of the restrictions which a state government could impose. Naturally, some of these restrictions can take the form of substantive standards, as the Ninth Circuit opinion states. But these restrictions can also take the form of regulatory action on licensing and distribution, which the Ninth Circuit suggests is somehow carved out of state authority by 18 U.S.C. 1161. NABCA believes that the Ninth Circuit's interpretation is erroneous and misreads the legislative history of the statute.

One of the most potent and effective sources of state restrictions on the activity of distributors and sellers of alcoholic beverages, whether Indian or non-Indian, is the licensing authority. With the authority to operate under a state-granted license, the seller of alcoholic beverages also assumes the restrictions placed on that authority; these restrictions can take the form of hours of operation, or of dispensing food along with alcoholic beverages, or of maintaining an orderly establishment.

Whatever the form of the restrictions, however, NABCA believes that Congressional intent is clear in showing that both states and Indian tribes have concurrent jurisdiction over all phases of regulation of transactions involving the sale and distribution of alcoholic beverages within Indian country and that there is no limitation on the type of restrictions which may be imposed by the states.

II.

THE NINTH CIRCUIT'S OPINION IS INTERNALLY INCONSISTENT

As indicated, the Ninth Circuit found that 18 U.S.C. 1161 granted the states no jurisdiction to license or distribute liquor in Indian country. *Rehner, supra,* at 1348. However, in two footnotes to its opinion, the Ninth Circuit indicates that the licensing and distribution activities which it condemned in the body of the opinion would be "unnecessary" if the state were to adopt substantive state standards and apply them directly to transactions in Indian country. *Rehner, supra,* footnotes 15 and 16.

NABCA believes that the Court is being inconsistent: on the one hand stating that the statute did not confer licensing and distribution authority on the states and on the other declaring that it does, in effect, have such authority, but must exercise it through "substantive restrictions."

It makes no sense, in NABCA's view, to declare that somehow a state's authority to license and distribute liquor in Indian country are not substantive standards and also to imply that a state could impose the same kind of restrictions as licensing and distribution if it did so through some undefined form of "substantive restrictions."

Statutes which provide for licensing of those who distribute alcoholic beverages and which provide for a state monopoly on the distribution of such beverages are "laws of a state" within the meaning of 18 U.S.C. 1161, it is contended, and the Ninth Circuit erred in indicating that these statutes were somehow to be accorded different treatment.

III.

IF FOLLOWED, THE NINTH CIRCUIT OPINION WOULD LEAD TO THE KIND OF DISCRIMINATION WHICH CONGRESS SOUGHT TO OUTLAW BY ENACTING 18 U.S.C. 1161

In reporting what was later to become 18 U.S.C. 1161, the Senate Committee on Interior and Insular Affairs stated its belief that "all legislation discriminating against our Indian citizens should be abolished." S. Rep. No. 722, *supra.*

However, if the opinion of the Ninth Circuit is allowed to stand, Indians will be granted a special status outside of the control of the alcoholic beverage laws of the state in which they reside, with the result that non-Indian citizens of the state will be the subject of discrimination.

For example, it is not clear under the Ninth Circuit's opinion whether a state could limit an Indian tribe to selling alcoholic beverages only to Indians, or only for consumption on Indian land. It is clear that state licensing regulations which prescribe hours of operation would not be permitted. The result would be that Indian tribes would be free to adopt whatever ordinances they wished for the distribution of alcoholic beverages, could permit the operation of 24-hour-per-day distributors, could sell liquor to non-Indians for consumption off Indian land, and could sell at a price that was substantially below that which prevailed for non-Indians. This latter situation would be particularly true in control states, where the right to sell and distribute alcoholic beverages rests solely with the state, which, in most cases, sets uniform prices for its citizens located in all parts of the state.

Operating pursuant to the authority granted in the Twenty-First Amendment, the 18 states which are

members of the National Alcoholic Beverage Control Association, have opted to control the distribution of alcoholic beverages by permitting little, if any, private enterprise to operate within their borders; what private enterprise that is allowed to operate must do so under tight state control, which may include a restriction that all alcoholic beverages dispensed must be purchased from the state.

The Ninth Circuit's opinion would give Indian tribes free reign to distribute alcoholic beverages in a manner which the tribes in their sole discretion determine; that determination could be under terms and conditions more favorable to Indian customers than to the customers of state-operated, or state-licensed establishments. Such a result would be discriminatory and should not be permitted.

CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Ninth Circuit and declare that, pursuant to 18 U.S.C. 1161, states and tribes have concurrent jurisdiction over all phases of the distribution and sale of alcoholic beverages within Indian territory.

Respectfully submitted,

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